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No. 86-1849

In The
SUPREME COURT of the UNITED STATES

October Term, 1986

Frances Lola Womack, Individually, and as Surviving Spouse of William Sydney Womack, Deceased,

and

James A. Chandler and wife, Iva I. Chandler,

Petitioners,

v.

Donald J. Gettelfinger & wife, Doris Y. Gettelfinger, d/b/a Gettelfinger Farms

and

Charles S. Ritter,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

Table of Contents.....i

Table of Authorities.....ii

I. The Intermediate Appellate Court Used A Standard in Reviewing the Propriety of a Motion for a Directed Verdict Whereby the Evidence Was Weighed by the Appellate Panel and No Inferences Were Given the Non-Moving Party.....1

II. This Case Has Far Ranging Application To Civil Law and Presents an Opportunity for this Court to Speak for the First Time on an Issue Where Conflict Exists Among the Circuits and on an Issue Which Arises Time After Time....14

III. The Court Improperly Applied the Applicable Law.....17

Conslusion.....20

TABLE OF AUTHORITIES

Cases	Page
Honaker v. Leonard, 325 F.Supp. 212 (E.D. Tenn. 1971)	9
Potter v. Tucker, 688 S.W.2d 832 (Tenn. Ct. App. 1985)	15
Inland Container Corp. v. March, 529 S.W. 2d 43 (Tenn. 1975)	18
Coppinger Color Lab Inc. v. Nixon, 698 S.W.2d 72 (Tenn. 1985)	19
Whittington v. Grand Valley Lakes, Inc., 547 S.W.2d 241 (Tenn. 1972)	19
Pitner FDIC, No. 85-175-II, Slip Op. (Tenn. Ct. App. August 1, 1986)	19
Sakamoto v. NAB Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983)	19
Garner v. Maxwell, 360 S.W.2d 64 (Tenn. Ct. App. 1961)	19
Grizzard & Cuzzort v. O'Neill, 15 Tenn. App. 395 (1932)	19

Statutes or Regulations	
49 C.F.R. § 391.35	10
49 C.F.R. § 391.23	12
49 C.F.R. § 391.31(f)	13

TABLE OF AUTHORITIES - Continued

Page

Other

2A J. Moore and J. Lucas, Moore's Federal Practice, § 50.06 (1986).... 15

27 Tenn. L. Rev. 389..... 18

I.

THE INTERMEDIATE APPELLATE COURT USED A STANDARD IN REVIEWING THE PROPRIETY OF A MOTION FOR A DIRECTED VERDICT WHEREBY THE EVIDENCE WAS WEIGHED BY THE APPELLATE PANEL AND NO INFERENCES WERE GIVEN THE NON-MOVING PARTY

When the Petition for Certiorari was filed herein, it was not appreciated that Respondents would take the position that the required Tennessee standard when considering a motion for directed verdict was utilized by the Appellate Panel below. A reading of the Opinion of the Sixth Circuit Panel shows clearly the required standard of viewing the evidences in a light most favorable to the non-moving party was obviously not utilized. Examples:

1. The Appellate Panel concludes, using its standard of review, the driver merely sustained a "lapse of judgment".

Actually, the driver himself testified:

a. That he had stopped driving earlier because the fog was so heavy he could not see and he knew that it was dangerous to continue. *(App. 181, 182, 157).

b. That when he started driving again just before daylight the fog was just as heavy. (App. 182).

c. That he knew it would be dangerous to be driving the truck in that kind of fog. (App. 181, 182).

d. That when he got off onto the two-lane highway, he realized that in the fog that he might have trouble maneuvering on the two-lane road. (App. 117).

e. That although knowing that it was dangerous and that he would have difficulty maneuvering, he did not wait until daylight because he was in a hurry to get to Somerset, New Jersey by 2:30 p.m. (App. 100, 191-192, 237). His boss admitted that it was "ridiculously" impossible to drive from Knoxville, Tennessee to Somerset, New Jersey in that time period. (App. 465).

f. He admitted that he intended, when he pulled into The Fishing Pole, to block both lanes of the highway. (App. 119).

* Cites herein to "App." are to Appendix filed with Court of Appeals.

g. That he intended to drive his tractor all the way across to the far shoulder. (App. 119-120, 264-265).

h. That he knew and intended this maneuver to take several minutes and that he would be blocking the road for 4-5 minutes. (App. 265-266).

i. He knew that oncoming traffic would be unable to see the trailer across the highway. (App. 117-118).

j. That despite federal and state requirements, he admitted that he failed to use any warning devices. (App. 124).

k. He admitted that he knew that it might be hazardous to block the road in heavy fog with his trailer for 4-5 minutes. (App. 126).

l. He stated that he was looking in the direction the car was coming but, for some reason, didn't see the car until it was right on top of him. (App. 128-130).

2. The Appellate Panel found that the trucking company relied upon the truck driver's competency certificate signed by Larry Goode (Opinion, page 15). Actual fact shown: The company did not rely upon this certificate as it issued

its own certificate of road test on the very day the driver was hired (App. 78). Actually, Goode's certificate did not even conform to Federal regulations (App. 502). Further, the company had not road tested the driver. Defendant company's certificate was false. (App. 72, 201-202).

3. The Sixth Circuit panel concluded the driver was operating his vehicle in low gear at half throttle in the roadway as Plaintiffs approached (Opinion, page 4). Actual fact shown: The driver was jackknifed and stopped as the Plaintiffs approached (App. 287-288).

4. The Appellate Panel decided the driver was "perhaps" concentrating on his rear wheels and ditch and did not see the oncoming car (Opinion, page 5). Actual fact: The driver admitted he was looking

in the direction from which the Plaintiffs were coming but failed to see the vehicle for some unknown reason (App. 130).

5. The Appellate Panel concluded the driver was on this two-lane road looking for diesel fuel (Opinion, page 4). Actual fact shown: The driver was illegally dodging the weight scales on the interstate; had been in a vehicle for this purpose on this road previously and had been in a vehicle which turned around at the very location where this accident occurred. (App. 114, 216, 230-232, 263, 395, 170-171).

6. The Appellate Panel found the driver slept from nine o'clock p.m. to six o'clock a.m. the morning of the accident (Opinion, pages 3-4). Actual fact shown: The driver's logs had been

altered to reflect this required rest time (App. 214-216). The driver had only slept over the wheel for a couple of hours (App. 211). This is significant in light of the Defendant company's policy of dispatching drivers for jobs, knowing the driver would have to drive over the legal number of hours. (App. 210-211, 242). It was the usual practice of this driver to drive over the federal safety regulated times. (App. 243). This driver had another accident only weeks later from falling asleep at the wheel. (App. 208-209).

7. The Appellate Panel felt the driver must have been competent in that he had driven several miles without significant incident. (Opinion, page 15). Actual fact shown: Petitioners introduced proof this driver was not competent

(App. 185-187, 208-209, 212-213, 262, 402-405, 443-445). The driver had never been in a truck alone before. (App. 227). Further, the proof introduced on behalf of Petitioners was that a competent driver would not have maneuvered his vehicle so as to block the highway. (App. 402-404, 258-260).

8. Without considering most of the above evidence which was found so compelling by the trial judge, and/or after discarding same, the Court of Appeals concluded that the driver "...evidently expected to make a safe turn". (Opinion, page 17). Parenthetically, it should be noted that one would not be able to reach the Panel's conclusion "...evidently" without weighing the evidence and discarding proof in favor of the prevailing

party, and giving credibility to certain parts of the Defendant's testimony.

In any event, the presumption required the opposite conclusion, to-wit, the driver could not reasonably have expected to make a safe turn. The driver himself testified that he intended to drive the vehicle across to the far shoulder and knew he would be blocking both lanes of traffic in the fog and darkness. Importantly, he knew he would block the road for 4-5 minutes. He knew that oncoming traffic would be unable to see the trailer blocking the highway in view of the fog and dark. He knew that despite Federal and State requirements, he failed to use any warning devices. He admitted he knew it might be hazardous to block the road in heavy fog for 4-5 minutes. (App. 124, 126, 117-118,

265-266, 269, 119-120). Clearly if the proper standard had been utilized, and the evidence not weighed by the Appellate Panel, the opposite conclusion would have been "evident". The Defendant was "consciously indifferent to the consequences." Honaker v. Leonard, 325 F. Supp. 212 (E.D.Tenn. 1971) At the very least, the aforesaid conclusion was just as "evident" as the conclusion of the Panel. Obviously, all presumptions were not given to the non-moving party.

9. The Court of Appeals found and Respondent now argues there was no evidence that the Defendant trucking company intentionally violated federal standards.

A. The facts presented at trial were that Federal regulations require a driving test and written test to be given (49

C.F.R. § 391.35). Neither test was given to the driver before the truck was entrusted. (App. 72, 201-202). Importantly, Defendant trucking company claimed to have given the required road test and the required written test and actually gave the driver a card signed by the trucking company certifying he had been so tested by Defendant trucking company (App. 78, 205). When faced with testimony of two witnesses that no road test had been given, the owner of the trucking company claimed that he had surreptiticusly followed the driver to give a test. Contrary to this testimony, the driver had not

been followed. Unknown to the owner, another driver, who in truth left with the Defendant truck driver, saw that the truck driver was not followed on the date he was hired. (App. 200-201).

B. Further, a written test is required to prevent accidents and "save lives". (App. 491). Contrary to the written certification given to driver, the written test was actually given after the present accident by an open book method (App. 73, 202). Defendant trucking company continued to show contempt of regulations even following the accident and to cover up its wrongdoing.

C. I.C.C. regulations require an investigation into the previous employment and driving record of a new employee (49 C.F.R. § 391.23). No attempt to investigate had occurred on the date of the accident or at any time afterwards (App. 495). Even a cursory investigation would have disclosed that the only road test Defendant driver had been given at another trucking company he had failed (App. 445) and he had been fired at his other previous employer when he was unable to maneuver a tractor trailer truck (App. 213).

D. The certificate, relied upon so heavily by Respondent and given such great weight by Judge

> Nelson by the Appellate Court's Opinion, was actually bought for One Dollar ($1.00) at a truck stop (App. 205). Importantly, it did not comply with the federal regulations (compare Exhibit 25, Exhibit 26 and 49 C.F.R. § 391.31(f)).

In support of their position that no evidence was introduced meriting the submission of this case to the jury, Respondents on page 11 of their brief claim that the "The trial court gave a very good summary of the case...". There follows a quote. The quote is not from the Trial Court at all. The quotation is from the opinion of the Court of Appeals resulting from the reassessment of the evidence as written by Judge Nelson.

Actually, the trial judge who heard the evidence, stated, contrary to Respondents claims that "...there was substantial evidence in the record from which the jury could have concluded that punitive damages were warranted." And further specifically found that "...the Plaintiffs produced a great deal of evidence regarding why their position of punitive damages was appropriate and should be sustained". See Appendix C to Petition to Certiorari, pages 5-6, 16. That this Appellate Panel reweighed the evidence, discarded certain evidence, gave no inferences in favor of the non-moving party, and reached its own conclusions is clear.

II.

THIS CASE HAS FAR RANGING APPLICATION TO CIVIL LAW AND PRESENTS AN OPPORTUNITY FOR THIS COURT TO SPEAK FOR THE FIRST TIME ON AN ISSUE WHERE CONFLICT EXISTS AMONG THE CIRCUITS AND ON AN ISSUE WHICH ARISES TIME AFTER TIME.

1. Respondents admit that a conflict exists among the circuits as to the standard to be applied in reviewing the propriety of a motion for directed verdict and admit the "question may be subject to debate". (Respondents Brief, page 6). Actually, a significant conflict exists among the circuits. Cases denoting the conflict are attached herein as Appendix A. The court is further directed to cases collected by Professor Moore at 2 A. J. Moore and J. Lucas, Moore's Federal Practice, §50.06 (1986). There cases are cited out of the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th and 11th Circuits where a federal standard has been applied. The Federal standard requires "substantial" evidence whereas Tennessee merely requires "any" evidence to avoid the motion. Potter v. Tucker,

688 S.W.2d 833 (Tenn. Ct. App. 1985). See also decisions from the 2nd, 3rd, 5th, 6th, 7th and 8th Circuits where state law on the issue was held to be controlling. (Note in the 7th Circuit an "aberration" occurs where a Federal standard was applied!)

Importantly, we have in this instance an Appellate Panel applying a very stringent standard where evidence is reweighed. If this case had arisen before another Circuit, a different standard clearly would have applied and the result would have been outcome determinative. Quite simply, if the evidence presented by Plaintiffs had been given weight, the punitive damage verdict would not have been disturbed.

Respondent argues that this Court must review the evidence to determine if

the facts at the trial court level were sufficient to create a jury question. While such a review using the proper standard was required by the Court below, this Supreme Court need not so review. This Court need only direct the Sixth Circuit Court of Appeals as to what standard of review is necessary. In fact, this case presents a clear and compelling opportunity for this Court to define a much needed uniform standard of review throughout the United States.

III.

THE COURT IMPROPERLY APPLIED APPLICABLE LAW

Contrary to the insistence of Respondent herein, the Appellate Panel herein applied an improper legal standard under Tennessee law. At page 10 of the Opinion, the Panel obviously applies

an Arkansas standard requiring mens rea, or sufficent mental state to imply malice, before punitive damages may be awarded. Tennessee has no malice requirement. Inland Container Corp. v. March, 529 S.W.2d 43 (Tenn. 1975). The Opinion even cites from a Vanderbilt law review which does not address Tennesseee law. Tennessee law is discussed in a Tennessee Law Review Article:

> The (Tennessee) decisions seem to follow a somewhat liberal policy, permitting punitive damages in cases of gross negligence as well as malicious conduct...[t]here is a tendency to expand the master's liability for the wrongful acts of his servants. Furthermore, the jury is given wide discretion in its assessment of punitive damages. From a survey of the cases reported, it is obvious that those who believe that punitive damages cannot be justified in theory will have to look to the legislature, and not to the courts for relief. 27 Tenn.L.Rev. at 389.

Had the Tennessee standard been applied, there is no question but that

the trial judge's finding of substantial evidence would have been supported.

> Whether or not punitive damages are to be awarded at all and if so the proper amount of such damages is pre-eminently for the jury to decide; but the discretion of the jury in fixing the amount of punitive damages is not beyond supervision by the Court.

Coppinger Color Lab, Inc. v. Nixon, 698 S.W.2d 72 (Tenn. 1985); Whittington v. Grand Valley Lakes, Inc., 547 S.W.2d 241, 243 (Tenn. 1977); Pitner v. FDIC, No. 85-175-II, Slip Op. (Tenn. Ct. App. August 1, 1986) ("the question of punitive damages is always for the jury to decide no matter what the facts are").

Under Tennessee law a jury question is created where a driver fails to take precautions knowing a hazard is created. Sakamoto v. NAB Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983); Garner v. Maxwell, 360 S.W.2d 64 (Tenn. Ct. App. 1961); Grizzard & Cuzzort v. O'Neill, 15 Tenn. App. 395, 399-400 (1932).

CONCLUSION

Petitioners earnestly petition this court to grant a writ of certiorari in this cause.

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APPENDIX

Circuits applying a Federal standard of review requiring the existence of "substantial" evidence to avoid a motion for directed verdict:

Cir.	Case
2nd	Reynolds v. Pegler, 223 F.2d 429 (2nd Cir. 1955) (holds Federal law controls) (Conflict within this Circuit.)
3rd	Walsh v. Miehle-Goss-Dexter, 378 F.2d 409 (3rd Cir. 1967) (holds Federal law controls) (Conflict within this Circuit.)
4th	Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir. 1985) (holds Federal law controls)
5th	Dobbs v. Gulf Oil Co., 759 F.2d 1213 (5th Cir. 1985) (holds Federal law controls)
7th	Kuziw v. Lake Engineering Co., 586 F.2d 33 (7th Cir. 1978) (holds Federal law controls)
9th	Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962) (holds Federal law controls)
10th	Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984) (holds Federal law controls)

APPENDIX - Continued

Cir.	Case
11th	Federal Kemper Life Assur. Co. v. First National Bank, 712 F.2d 459 (11th Cir. 1983) (holds Federal law controls)

Circuits holding that State standards of review apply:

2nd	Merced v. Auto Pak Co., 533 F.2d 71 (2nd Cir. 1976) (holds State law controls) (Conflict within this Circuit.)
3rd	Stopper v. Manhattan Life Ins. Co., 241 F.2d 465 (3rd Cir. 1957) (holds State law controls) (Conflict within this Circuit.)
6th	Toth v. Yoder, 749 F.2d 1190 (6th Cir. 1984) (holds State law controls)
7th	Perzinski v. Chevron Chem. Co., 503 F.2d 654 (7th Cir. 1974) (holds State law controls)
8th	Lindsay Constr. Co., v. Erickson, 352 F.2d 425 (8th Cir. 1965) (holds State law control)

In Tennessee the standard whether there is any evidence to support the verdict below. This standard is considerably less stringent than the Federal test.